IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation, Plaintiff, vs. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual, Defendants.	CIVIL ACTION No. 00-2041

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES AGAINST DEFENDANT, JOHN HERKLOTZ

INTRODUCTION

By its Order of July 21, 2006, this Court determined that Defendant, John Herklotz, was liable to Plaintiff as guarantor of the debt of Plaza Entertainment, Inc. With regard to the amount of the liability, the Defendant, Herklotz, contended in his Motion for Partial Summary Judgment that the business records of WRS were unreliable and, therefore, would not be sufficient to be personally liable for the amount owed to WRS by Plaza Entertainment, Inc. and guaranteed by Herklotz. By Stipulation, WRS and Herklotz agreed to retain Schneider Downes, Inc. as forensic accountants to review WRS's records and to offer an opinion as to the accuracy and reliability of those records. Pursuant to the Stipulation, although neither party was bound by the report, either party was entitled to rely upon a report to establish its case. With the entry of Judgment as to liability, the only issue remaining is the amount of Herklotz's liability to Plaintiff.

On October 6, 2006, Schneider Downes, Inc. provided a draft report concluding in its summary that Plaintiff's business records were reliable and accurately reflected the transactions between WRS and Plaza and concluded that on December 31, 2000 Plaza Entertainment, Inc. owed WRS the sum of $1,270,683.34 on the account. The Report is attached as Exhibit "6" to the Concise Statement. (Exhibits 1 through 5 are attached to the Napor Affidavit). Plaintiff has filed an Affidavit of Jack Napor in which he establishes that the amount of his personal knowledge in his review of the business records the amount owed by Plaza Entertainment, Inc., based upon those records, as of the date of the Affidavit, is the sum of $2,581,808.57 including counsel fees. Plaintiff has also made a claim for counsel fees, which are recoverable to under the Terms and Conditions listed as Exhibit "4" of the Napor Affidavit and the Services Agreement, Exhibit "5", to the Affidavit, and the Herklotz Guaranty Exhibit "7" to the Concise Statement. In support of the claim for counsel fees, Plaintiff has filed an Affidavit of Thomas E. Reilly, Esquire, president of Thomas E. Reilly, P.C., which he has attached a summary of the work done and the billing amounts of accrued attorney's fees with respect to the Plaza Entertainment, Inc. obligation.

Based upon Plaintiff's Concise Statement of Facts, supported by the Affidavit of Jack Napor and the Affidavit of Thomas E. Reilly, Esquire, Plaintiff respectfully submits that there remains no genuine issue of material fact as to the amount owed by Plaza Entertainment, Inc., which is the amount of the obligation owed by Defendant, John Herklotz. Plaintiff respectfully requests, therefore, that Summary Judgment be entered in its favor:

ARGUMENT

Rule of Civil Procedure 56(c) permits Summary Judgment if the pleadings, Depositions, Answers to Interrogatories and Admissions are filed together with the

Affidavits, if any, show there is no genuine issue as to any material facts and that the moving party is entitled to Judgment as a matter of law. On such a Motion, the moving party has the burden of providing that there exists no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317; 106 S. Ct. 2548; 91 L. Ed. 2d 265 (1986). Once the moving party has met its burden, the non-moving party must come forward with specific facts demonstrating a genuine issue of material fact exists. William v. West Chester, 891 F.2d 458 (3d Cir. 1990). This specific specificity requirement avoids a "pointless trial" serving only to cause delay and unnecessary expense. Goodman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1975), cert. denied, 429 U.S. 1038, 97 S. Ct. 732, 50 L. Ed.2d 748 (1977). There is no genuine issue of material fact unless the non-moving party shows that there is sufficient evidence favoring the non-moving party for a jury to render a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986).

While Fed. R. Civ. P. 56(e) permits partial Summary Judgment as to liability when an issue of fact remains about damages, Summary Judgment as to damages is appropriate when there is no genuine issue of material fact as to the amount owed to Plaintiff. Chrysler Credit Corp. v. Marino, 63 F.3d 574, 580 (7th Cir. 1995), SBA Network Services, Inc. v. Telecom Procurement Services, Inc., et al., 2006 U.S. Dist. LEXIS 62234 (W.D. Pa. 2006).

In Marino, the Court entered Summary Judgment based upon the Affidavit that established the amount owed based upon the affiant's personal knowledge of the Plaintiff's business records when the Defendant failed to produce specific evidence contradicting those records. Similarly, in Resolution Trust Co. v. Starkey, 41 F.3d 1018

(5th Cir. 1995), the Court upheld the entry of Summary Judgment based upon an Affidavit that set forth the calculation of the amount owed by the Defendant based upon Plaintiff's business records. In SBA Network Services, Inc. v. Telecom Procurement Services, Inc., et al., this Honorable Court after entering summary judgment as to liability, entered summary judgment on the issue of damages following finding based upon the parties submissions consisting of the Plaintiff's business records and an affidavit delineating the time spent and hourly rate of Plaintiff's counsel.

Here, WRS relies upon the Affidavit of its president, Jack Napor as to its contractual damages and the Affidavit of Thomas E. Reilly, WRS's Counsel to establish WRS attorney's fees. While Fed R. Civ. P. 56(e) requires an Affidavit submitted in support of a Motion for Summary Judgment to be made with the Affiant's personal knowledge, that personal knowledge may come from review of the business records with which he is familiar. Londrigan v. F.B.I., 216 U.S. App. DC 350, 670 F.2d 1164 (DC Cir. 1981).

Federal Rule of Evidence 803(6) recognizes the inherent credibility and reliability of records kept in the ordinary course of business making business records proper for the Court to consider in support of a Motion for Summary Judgment as to damages. Pine Ridge Coal Co. v. Local 8377, UMW, 187 F.3d 415 (4th Cir. 1999); LINC Fin. Corp. v. Onwuteaka, 129 F.3d 917, 921-22 (7th Cir. 1997).

Based upon the forgoing, Plaintiff submits that the Affidavit of Jack Napor attesting based upon his personal knowledge that the business records of WRS accurately state the amount owed would be sufficient to establish *prima facie* case. However, because of the Stipulation between WRS and Herklotz, in addition to the inherent reliability of records kept in the ordinary course of business, WRS relies upon the opinion of Schneider Downes, Inc. asserting that based upon their audit of those records, WRS's records were kept in the ordinary course of business and reasonably state the amount that is due. Use of an auditor's opinion as to the reliability of business records is proper when considering a Motion on the issue of damages. Huge v. Reid, 468 F. Sup. 1024 D.C. Ala. (1979); 615 F.2d 916 (5th Cir. 1980).

WRS's burden with respect to damages is to offer proof with reasonable certainty. William B. Tanner Co., Inc. v. WIOO, Inc., 528 F.2d 262, 271 (3d Cir. 1975). All that WRS must do is offer proof that would provide a reasonable basis for the trier of fact to calculate damage then to arrive at an intelligent estimate of WRS's loss without conjecture. Delahanty v. First Pennsylvania Bank, N.A., 318 Pa.Super 90, 464 A.2d 1243 (1983); Brisbin v. Superior Valve Co., 398 F.3d 279 (3d Cir. 2005). WRS submits that its records were kept in the ordinary course of its business as established by the Napor Affidavit and supported by the Schneider Downes, Inc. opinion satisfies WRS's burden with respect to this Motion for Summary Judgment.

Once the moving party has met this burden as to damages, it becomes incumbent upon the nonmoving party to establish evidence of credits, payments, etc. to refute the Plaintiff's evidence. Golden Oil Co. v. Exxon Co., U.S.A., 543 F.2d 548 (5th Cir. 1976), SBA Network Services, Inc. v. Telecom Procurement Services, Inc., et al.,,supra. Herklotz is however, legally precluded form challenging the amounts of any unpaid invoice included in WRS's claim. The "Terms and Conditions" that govern the WRS relationship with Plaza Entertainment, Inc. (Exhibit "4" to the Napor Affidavit) contain the following language:

> any claims that the customer may have against the company for adjustment or which in anyway would effect any invoices must be presented to the company in writing no later than 30 days from the date of the invoice in question. Customer hereby irrevocably waives any claim for adjustment or change or modification and any such invoice in which such claim is not presented in writing to the company within 30 days.

Thus, if an invoice is not disputed in writing within 30 days, the invoice is deemed undisputed. WRS submits that each invoice submitted after which no objection or adjustment has been demonstrated in writing constitutes an account stated and the result of which is to render Plaza Entertainment, Inc. liable for the amounts due in absence of clear and convincing evidence of fraud or mistake. Mahoney Trustee v. Boenning, 335 Pa. 210, 6 A.2d 793 (1939). Therefore, unless Herklotz can demonstrate a written objection to any particular invoice submitted within 30 days of the date of an unpaid invoice, Herklotz cannot dispute the amount of each invoice shown on the WRS business records.

Herklotz did not plead the affirmative defense of "payment" provided for in F.R.C.P. 8(c). Rather, Herklotz's sole contention has been that the records of WRS are insufficiently reliable. WRS agrees that business records, which are "untrustworthy" are not probative and would not satisfy the requirements of Fed.R. E. 803. However, it is incumbent upon the objector to come forward with evidence to establish "untrustworthiness". Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978). Even if certain inaccuracies are demonstrated in the business records, such inaccuracies made in error may not render the records "untrustworthy" or inadmissible since the Court has broad discretion in determining the applicability of business records. United States v. Patterson, 644 F.2d 890 (1st Cir. 1981). As the Court said in Patterson, "If the existence of random errors were enough to avoid the exception of the Business

Records Rule, the exception would swallow the rule." Patterson, 644 F.2d 901. Here, especially in light of the Schneider Downes, Inc. report, Plaintiff submits that the business records accurately reflect the amount owed by Plaza Entertainment, Inc. to WRS and guarantied by Herklotz. The potential for random errors (although refuted by the Schneider Downes report) would not be sufficient to prevent the entry of Summary Judgment. Furthermore, Herklotz cannot rely on the possibility further undermining the business records by "cross-examining" Plaintiff's witness. Defendant "cannot defeat a Motion for Summary Judgment in the mere hope cross-examination of an adverse witness will support their claim. Charles A. Wright, et al., Federal Practice and Procedure §2741 (2d. 3d. 1983); see also Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 384, 392 (D.P.R.1981). WRS respectfully submits that the Defendant has not and cannot establish a genuine issue of material fact as to the amount of damages to which WRS is entitled in this matter.

As set forth in the Concise Statement, and the Napor Affidavit, each invoice sent by WRS to Plaza Entertainment, including those paid by Plaza Entertainment, Inc. provided that its invoice was not paid within 30 days, finance charges would accrue on the outstanding invoice amount at the rate of 1.5 percent per month, which is equal to 18 percent per annum. The records kept in the ordinary course of business of WRS and confirmed by Schneider Downes, Inc. verify the calculation of the finance charges. The Affidavit of Jack Napor has brought forward the finance charges on the outstanding balance from July of 2001 to the present.

It is recognized in the Courts of Pennsylvania that it is common commercial circles, including in transactions between merchants for balances to be subject to interest charges. The inclusion of such charge in an invoice would unexpected and therefore would constitute part of the agreement between the parties. Herzog Oil Field Service, Inc. v. Otto Torpedo Co., 391 Pa. Super 133, 570 A.2d 549 (1990); Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102 (3d Cir. 1992); Cooking Image Corp. v. Hemispherx Biopharma, Inc., 2001 U.S. Dist. LEXIS 6476 (E.D. Pa. 2001). Thus Plaza Entertainment, Inc. and consequently, Herklotz as its guarantor owe interest at the rate of 1.5% per month on the unpaid invoices.

In addition to the amount of unpaid invoices and the service charges due under the services agreement (Exhibit "5" to the Napor Affidavit) Plaza entertainment ,Inc and in the Terms and Conditions, (Exhibit "4" to Napor Affidavit) provided that Plaza Entertainment, Inc would pay storage charges on materials left at WRS. As of August 1, 2001 Plaza Entertainment, Inc stored 65 pallets of materials at WRS as shown on the August 1, 2001 invoice Exhibit "3" to the Napor Affidavit, for which a monthly charge of $650 was imposed. As explained in the Napor Affidavit, the WRS lost control of its facility on May 31, 2006 and the Napor Affidavit has quantified the storage charges accrued form August 1, 2001 through May 31, 2006 in the sum of $38,850.00, plus interest at 1.5% in the sum of $12, 080.25.

Also, under the services agreement (Exhibit "5" to the Napor Affidavit), the Plaza Entertainment, Inc and in the Terms and Conditions, (Exhibit "4" to Napor Affidavit) and the Services Agreement and the Herklotz in his Guaranty (Exhibit "7" to WRS's Concise Statement) Herklotz and Plaza Entertainment, Inc. agreed to pay WRS's attorneys fees .

Under the American Rule, parties are typically responsible for their own attorney's fees. P.N. v. Clementon Board of Education, 442 F.3d 848 (3d Cir. 2006).

However, attorney's fees may be recovered if there is an agreement between the parties that provides for the awarding of attorney's fees. Pennsylvania v. Flaherty, 40 F.3d 57 (3d Cir. 1994). Because the agreements between WRS and Plaza, Inc and Herklotz's Guaranty, allows WRS to recover its reasonable attorney's fees, WRS submits that they are an integral part of the damages to which it is entitled in the above matter.

To establish those attorney's fees, Plaintiff has filed the Affidavit of Thomas E. Reilly. The amount of reasonable attorney's fees is an issue for the Court's discretion based upon its consideration of the time spent and reasonable hourly rate. SBA Network Services, Inc. v. Telecom Procurement Services, Inc., et al., supra. The time and billing records establish the "lodestar' from which the Court calculates and awards reasonable attorneys fees. Hensley v. Eckerhart, 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

In the Complaint, WRS averred an estimate of $100,000.00 to collect the obligation evidenced by the Plaza Entertainment, Inc. account and Guaranties. Here the Affidavit of Thomas E. Reilly, Esquire of Thomas E. Reilly, P.C., sets forth the time spent on this matter over a period of six years and hourly rate for the work performed. As of October 11, 2006, WRS has filed an Affidavit of its counsel fees that it has incurred attorney's fees calculated by the hourly rate in the sum of $86,748.00 which does not include the efforts that will be incurred in enforcing the Judgment absent a settlement in the above matter. Therefore, Plaintiff submits that it is entitled to Judgment against John Herklotz in addition to the amount set forth in the Affidavit of Jack Napor, for attorney's fees.

CONCLUSION

In conclusion, WRS, Inc. respectfully submits that it is entitled to Summary Judgment against the Defendant, John Herklotz, on the issue of damages in the sum of $ Entertainment, Inc., Eric Parkinson and Charles von Bernuth, jointly and severally, in the sum of $2,527,029.03 plus additional interest on the sum of $1,205,827.84 at the rate of 1.5% per month from October 13, 2006 and additional Attorneys fees for enforcement of an judgment.

Respectfully submitted,

THOMAS E. REILLY, P.C.

BY: ____/s/ Thomas E. Reilly______

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CERTIFICATE OF SERVICE

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of the Brief in Support of Plaintiff's Motion for Summary Judgment as to Damages against Defendant, John Herklotz, was delivered via first-class mail, postage pre-paid on the __13th__ day of October, 2006 to the following:

Eric Parkinson, individually and
As President of Plaza Entertainment, Inc.
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BY: ______/s/ Thomas E. Reilly________
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Attorney for Plaintiff, WRS, Inc.